No. 128

CURRENCY BUREAU.

CERTIFICATION OF CHECKS ON NATIONAL BANK—ISSUE OF CASHIER'S CHECKS.

Office of the Comptroller of the Currency,

Washington, June 5, 1867.

DEAR SIR:—I notice by Mr. Callender's report of his examination of your Bank two points to which I desire to call your attention. I refer to the certification of broker's checks in excess of actual balances, and to the issue of cashiers' checks. The first I presume to be an abuse of a practice which has grown to be a necessity in the transaction of business in New York. Probably you would reject without hesitation a proposition to certify in this way for your depositors without discrimination, and very few outside of a particular class would have the imprudence to demand the privilege of overdrawing their accounts. How it happens that brokers alone claim this extraordinary indulgence, I am not prepared to explain. Why they cannot trust each other instead of requiring each other to put forward his bank as the responsible party in all transactions, I will leave you to explain. It only seems to me that the demand is utterly unreasonable and one that the banks would not only be justified in rejecting, but one that prudence would require them to repudiate. I do not say this as bearing particularly upon your particular case, but upon the practice in general; and I am much gratified to learn from Mr. Callender that you have expressed a readiness to lend your co-operation to some practicable remedy.

As to the second point, I ground my objection to the issue of cashiers' checks upon the law. A National Bank can borrow money in either of three different ways—by issuing bills of exchange, by receiving de-

posits, and by the issue of circulating notes. I find no other method authorized in section eight of the law which defines your corporate privileges. If a cashier's check is issued in payment of a depositor's check, it is paid out in lieu of the money called for by the depositor, and as such would be prohibited by the last clause of section twenty-three.

If the depositor has the money to his credit, he is entitled to receive it; if he has not, you are under no obligation to pay the check at all. In a personal interview with you I could talk of these things in a way that would not be objectionable; in a letter there is necessarily more of formality, and what I say may seem more dictatorial. I only wish you to understand that my only desire and study is how best to promote the interest entrusted to my charge, and I am confident that with the assistance and co-operation of the New York banks the national banking system can be made all that its most ardent friends could desire. But the New York bankers must take the lead—must give tone and hearty support. It rests with them to direct, control and perfect the system. If they would realize how much depends upon them, I should have no fears for the future.

Very respectfully,

H. R. HURLBURD,
Comptroller.

HON. E. HAIGHT,
President National Bank of the Commonwealth,
New York City.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 128.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Petitioner*,

versus

S. O. POTTORFF, RECEIVER OF THE FIRST NATIONAL BANK OF EL PASO, TEXAS, *Respondent*.

REPLY BRIEF OF THE TEXAS AND PACIFIC RAILWAY COMPANY.

To the Honorable the Supreme Court of the United States:

In the introductory statement of respondent's reply brief (page 3) an erroneous premise is assumed, namely: "It is settled that the provisions of this act as to discounting notes, receiving deposits, etc., are to be read as descriptive of the kind of banking which is authorized and as illustrative of incidental powers. * * * It follows that the incidental powers granted by the act are not those incidental to receiving deposits, etc., but are those 'necessary to carry on the business of banking' ".

If the provisions of the Act (section 24, par. 7) are "descriptive of the kind of banking which is authorized", obviously those provisions are not merely "illustrative of (the) incidental powers" granted. The conclusion, therefore, that "the incidental powers granted by the Act are not those incidental to receiving deposits" is clearly erroneous. Moreover, the cases cited by respondent hold that both the banking businesses specified in section 24 and the incidental powers necessary to carry on those businesses are granted.

In the second department of his reply brief, respondent states: "In determining what powers are 'necessary to carry on the business of banking,' we may well adopt as a general statement the definition of Mr. Chief Justice Marshall when he said that, necessary, 'imports no more than that one thing is convenient, or useful, or essential to another'." (page 4.) But respondent says Chief Justice Marshall's definition of the word "necessary" is tempered by Mr. Chief Justice Waite's statement in *First National Bank of Charlotte v. National Exchange Bank,* that a national bank's incidental powers "are such as are required to meet all the legitimate demands of the authorized business, and to enable the bank to conduct its affairs within the general scope of its charter, safely and prudently (92 U. S. p. 122, 23 L. ed. pp. 679-681). From this premise it is argued, not that the particular pledge in the case at bar was unsafe or imprudent, but that as a general proposition it would neither be safe nor prudent for national banks to possess and exercise the implied power to pledge assets to secure deposits. This, of course, is simply another way of saying that such pledges are against public policy. This

theory of the case was urged in, but was rejected by, the Honorable Circuit Court of Appeals.

The court below did not state its reasons for rejecting respondent's contentions that the pledge was against public policy, but it may have shared the views of the Supreme Court of Indiana on the subject. That Court said in *Schornick v. Butler, 185 N. E. 111, 112-113:*

> "It is urged that it is against public policy to permit banks to pledge assets to secure the payment of deposits.
>
> "Constitutional and statutory enactments, practices of officials, and judicial decisions may be looked to for a disclosure of the public policy of a state. Legislative enactments are the safest guides and the fairest in that they operate prospectively and as a guide to future negotiations. Decisions of courts of last resort operate in the same manner after their pronouncement, but in the first instance may have the effect of destroying the contract made before the public policy is announced.
>
> "'Without minimizing the importance of the doctrine that contracts should not be enforced if they contravene public policy, many courts have cautioned against recklessness in condemning contracts as being in violation of public policy. Public policy, some courts have said, is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some postive statute or some well-established rule of law. Other courts have approached the remark of an English judge that public policy is an unruly horse astride of which one may be carried into unknown paths. Considerations such as these have led to the statement that the power of the

courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' Hogston v. Bell, 185 Ind. 536, at page 544, 112 N. E. 883, 885."

Or, the Circuit Court of Appeals may have approved the reasoning of Judge Dickinson who dissented in *Baltimore & O. R. Co. v. Smith*, wherein he stated in part:

"The policy of the law: This takes us into the domain of economics, a subject the limits of which are expansive and elastic. The practice said to be condemned as against the policy of the law is that of securing depositors. The first query aroused is how any act or practice can be one which the law condemns when it is the very act or practice which the law enjoins. The banking policy or practice of securing deposits may be wise or foolish, sound or unsound, good or bad. There may or may not be room for a difference of opinion on the subject, but the policy or practice is the same whether the deposit secured is that of A or B. How can A insist that the bank secure his deposit and yet condemn the bank for doing something against the policy of the law if the deposit of B is likewise made secure? Does it change the situation any if A is an official or the moneys deposited by him are public moneys? We are not speaking of the power or wisdom of the Legislature in laying down one rule of policy for public deposits and another for private but of the wholly different question of whether the courts should condemn as against the policy of the law something which the law enjoins when its own interests are affected. It is easy to understand that any banking practice may in the judgment of the members of a court be condemned as unwise or even ruinous in its consequences,

but can it for this reason be found to be illegal because against the policy of the law? * * * With respect to banking policies the managers of no bank have the wish to harm it, and any policy which is followed by the banks is quite as likely to be sound if left to the judgment of trained bankers as it is if dictated by the courts following any supposed policy of the law." (56 Fed. (2d) 799, 804, 805.)

Respondent lays much stress upon *Thomas v. West Jersey Railroad Company, 101 U. S. 71, 25 L. ed. 950,* but the particular contract in that case rendered the carrier unable to perform its public functions because by it the company's "railroad and all appurtenances and franchises, including the right to do the business of a railroad" were surrendered to another company (U. S. p. 79, L. ed. p. 951). We have no such condition here.

Although offering no evidence upon the trial of this case (R. 88), respondent now advances numerous arguments to prove that, generally speaking, the pledging of assets to secure "private" deposits "is calculated to render a bank unsafe and incapable of performing its proper functions" and "is destructive of sound banking, is not useful or essential, is not necessary, and is therefore not within the authority conferred by implication" (page 5).

Let us examine these arguments, in the order presented.

Prefacing his remarks the respondent observes that "national banks have become charged with a public interest" (page 6), but so has the railway company who stands to lose the greater portion of its deposit if the judgments of the lower courts are upheld.

The receiver states, "It is a far cry from the private banker of old England to the modern institution of today"

(page 6). In some respects this may be true, but the deposit system of today is similar to the first banking business in England. We quote from the opinion of this Honorable Court in *Auten v. United States National Bank of New York, 174 U. S. at page 142, 43 L. ed. p. 926:*

> "The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons 'to borrow, owe or take up any sum or sums of money on their bills or notes payable at demand.' And it had effect until 1772 (about thirty years), when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created—the evidence only is different. In one case it is a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (cheques) of his creditor; in the other by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned."

It is stated that "banks in these days must publish at stated intervals reports which show the nature of their assets and liabilities" (page 6). Respondent apparently refers to section 161 of the National Bank Act, as amended Feb. 25, 1927, c. 191, § 13, 44 Stat. 1232, which reads in part:

> "Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to form which may be prescribed by

him * * *. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the comptroller within five days after the receipt of a request or requisition therefor from him; and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the comptroller, shall be published in a newspaper published in the place where such association is established * * *. The comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition."

In connection with the reports of national banks to the Comptroller, and to the public, respondent says:

> "As they are now prepared, these reports make no mention of pledges which may have been made to secure individual private deposits. The public is led to believe that all of the particular bank's assets, except such as may, in accordance with law, secure public deposits, stand as security for the payment of all private deposits, without preference, and upon the strictest equality. If present publications are continued and pledges are made to secure private deposits, such pledges will be made in secret so far as the public is concerned. The result is the perpetration of the grossest fraud on unsecured creditors of the bank" (page 6).

The form of report required by the Comptroller is not of record, and presumably respondent wishes the Court to take judicial notice of its provisions. Should this be done the Court will find that such reports did not inform either the

Comptroller or the public of assets pledged to secure public deposits. Furthermore, the Comptroller has the power to compel national banks to make a full disclosure to the public of all pledges, both public and private, for section 161 requires that reports to the public and to the Comptroller be prepared "according to the form which may be prescribed by him".

We note these statements by Circuit Judge Alschuler in his dissenting opinion in *Sneeden v. City of Marion, Ill., 64 Fed. (2d) 721, 731:*

> "It is pointed out * * * that ordinarily there is secrecy in such (public) pledges of which the general public has no notice, and that depositors not so secured would usually have no means of knowing how much of the bank's reported assets are so segregated.
>
> "It seems to me that the vice is not with the pledging of the assets, but with the laws and regulations concerning reports and advertisements of banks."

The receiver asserts that banks should not have the implied power to pledge assets to secure deposits, because in some instances the value of the pledged securities might greatly exceed the amount of the deposit (pages 7-8). In the case at bar the railway company maintained an average daily deposit in the bank in excess of $50,000, the par value of the pledged liberty bonds (R. 46, 47, 93). Furthermore, it is extremely doubtful that any banker could ever be coaxed into giving more than a dollar security for a dollar deposit.

Respondent fears that the pledging of assets to secure deposits might lead to some creditors being preferred over others in the event of insolvency. All pledges made after the commission of an act of insolvency or in contemplation

thereof, are declared void by section 91 of the National Bank Act, but "liens, equities or rights arising * * * prior to insolvency and not in contemplation thereof are not invalidated". "The provisions of the Act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency". *Scott v. Armstrong, 146 U. S. at page 510, 36 L. Ed. page 1063.*

Respondent contends (page 9) that the absence of any case in the Federal Courts prior to 1931 involving a pledge of assets to secure a private deposit is evidence that the practice has not been found necessary or helpful, but he asserts that the absence in those Courts for a long period of any case involving a pledge of assets to secure a public deposit is explained by the Comptroller's recognition of the validity of such pledges. Might not the absence of litigations over private deposits be likewise explained?

We note this statement in Judge Dickinson's dissenting opinion in *Baltimore & O. R. Co. v. Smith, 56 Fed. (2d) 799, 804:*

> "The practice has of late grown up, and recent happenings in banking circles has doubtless furthered it for depositors, particularly those carrying large balances such as railroads, trustees for estates, and banking institutions to ask for and receive security for their deposits. Comptrollers have known of this. Some of them have doubtless scolded; but they have permitted it * * *."

We find nothing in the record to support respondent's statement that the pledge "did not take place until the heavy withdrawals, which closed the bank, had begun"

(page 10). However, the existence of such condition would have warranted the officers of the bank in making the pledge to prevent the withdrawal of the railway company's deposits when the surety company went off the bank's bond protecting those deposits.

The receiver says "if each depositor insists upon his deposit being guaranteed by the pledge of collateral, the bank's ability to lend, and thereby earn a profit, is seriously impaired" (page 10). This is obviously untrue because for each dollar of security pledged the bank receives a dollar by deposit which it may in turn lend to others.

Respondent also argues that securing deposits is a bad banking policy. A similar argument was rejected by the Supreme Court of Indiana in *Schornick v. Butler, supra.* The Court said:

> "It is urged that it is bad policy for banks to give security for money deposited. That unless security is given for all deposits, unsecured depositors will withdraw their funds and thus destroy the business of the bank. This is a question of business policy with which we are not concerned, but it is well known that banks do pay interest on some types of deposit and not in others." (185 N. E. 112.)

It is contended that the pledging of assets to secure some depositors, will drive other depositors away and thus bring ruin upon the banks, disabling them from performing their public functions. This has not proved true in the cases of security for public deposits, and in those cases the individual depositor has the same reasons to complain.

Banks depend in a large measure upon the accounts of large depositors who require security. If national banks

cannot give that security, it may be expected that those accounts will go elsewhere, to state or private bankers, with resulting injury to the losing banks. Judge Dickinson considered this in his dissent in the Smith case. He stated:

> "A word should be added on behalf of the depositor. He may be the trustee of an estate holding moneys for which he and his sureties are responsible. Why should he be denied a protection which is granted to the custodian of public moneys? Surely neither the bank nor other depositors are harmed and may be benefited. Assume the case of such a trustee with a large deposit balance. He may have no need to withdraw his moneys but he may be alarmed. If secured, he will leave his moneys with the bank. If not secured, what may he do and with what consequences to the bank, to its stockholders, and its other depositors?" (56 Fed. (2d) 799, 805.)

The receiver states that the Comptroller has consistently maintained the position that National banks have no power to pledge assets to secure private deposits (page 11). Although no evidence was introduced by the receiver upon the trial of this case he now seeks to support this statement by appending to his reply brief copies of two letters written by Deputy Comptroller F. G. Awalt: one dated December 13, 1929, addressed to a Grand Secretary of the Grand Lodge A. F. & A. M. of Nebraska, at Omaha; and the other dated January 30, 1931, and addressed to the President of the First National Bank of Hornell, New York. These letters, of course, are improperly before the Court; furthermore, they do not support the receiver's contention, one being addressed to a fraternal association and the other written the day *after* the pledge agreement was made in

the case at bar. If this be a departmental interpretation by the Comptroller, which is denied, it certainly cannot be given retroactive effect. *Shearer v. Anderson, 16 Fed. (2d), 995, 996.*

Respondent quotes from *Baltimore & O. R. Co. v. Smith, 56 Fed. (2d) 799,* in which the Court states that "it is admitted that whenever the Comptroller was asked for an opinion as to the power of national banks to pledge collateral to secure private deposits, in every instance, he has disapproved of such pledges and held that, in his opinion, national banks do not have that power." It is clear that the receiver cannot, after the record is closed, make proof in this case by referring to a different case in which the judgment was based upon an agreed statement of facts.

The letter of the acting Secretary of the Treasury addressed to the House Committee in charge of Senate Bill 486, and set out on pages 12 and 13 of respondent's reply brief, relates wholly to the securing of public monies of States and their political subdivisions, and does not indicate the attitude of the Secretary towards the pledging of assets to secure private deposits.

Certain testimony given by respondent is set out on page 14 of his reply brief, followed by this statement:

> "It is thus apparent that neither the Comptroller nor any of his examiners knew of this pledge until shortly before the bank was closed, and that the Comptroller was never called upon to pass on the validity of this pledge."

Respondent failed to quote this testimony given by the receiver:

> "I could not tell the date the examiners made examination of the securities of this railway; very likely

was the first day the examination started, because the first thing the examiners do when they come is verify the cash and check up the securities" (R. 83).

Furthermore, the trial court found that,—

"National Bank Examiners, acting under the supervision and control of the Comptroller of the Currency made an examination of The First National Bank of El Paso, commencing at 8 o'clock A. M. on August 6, 1931, and ending at noon on August 20, 1931. The report of said bank examiners to the Comptroller covering the condition of said bank showed that liberty bonds of the par value of $50,000:00, were then pledged to secure the deposit of The Texas and Pacific Railway Company. This information was obtained from the books of the bank probably during the first two or three days of the examination."

The bank examiners were agents of the Comptroller and information obtained by them was imputed to the Comptroller.

The receiver contends that "Congress, by passing the Act of June 25, 1930, section 45 (R. S. 5153), made it clear that national banks should thereafter have no power to pledge their assets to secure private deposits" (page 15). This argument was urged in the Circuit Court of Appeals without success. It will be noted that the opinion of that Court is not at all predicated upon this theory. Furthermore, the legislative history of that Act, as set forth in *Baltimore & O. R. Co. v. Smith, 56 Fed. (2d) 799, 802,* disproves this contention.

Senate Bill 486, 71st Congress, 2d session, which became the Act of June 25, 1930, was designed to remove certain doubts in the mind of the Attorney General for the State of

Minnesota as to the power of national banks to pledge their assets as security for the deposits of that State and its political subdivisions. The report of the Senate committee was based upon a letter from the Attorney General of Minnesota in which he thus voiced his anxiety:

> "* * * The national banks of this State have pledged with the State and the various subdivisions thereof millions of dollars in Government and other bonds as security for public deposits. They are anxious to be permitted to do so, and we are willing that they should. Under the law as it now stands we may be taking a chance in accepting such pledges from the national banks, and we should like to have the chance removed by legislation in Congress which will *specifically* authorize such pledges by national banks" (our italic).

And the House committee reported S. 486 favorably because of a request from the Acting Secretary of the Treasury, reading in part as follows:

> "'While the office of the Comptroller of the Currency has consistently taken the position that national banks have the right to give security for the safekeeping and prompt payment of public moneys of the State or political subdivision thereof deposited with such national banking associations, several recent decisions have thrown some doubt on this question with the result that in some States the State banks may secure the public deposits, but the officers of the State are in doubt about depositing with the national banks in the absence of any *specific* law by Congress on the subject. It would be extremely helpful, therefore, if it is possible for your committee to report out, and the House pass, S. 486'" (our italic).

It thus clearly appears that Congress, by amending section 90 of the National Bank Act to afford the specific relief sought, had no intention to and in fact did not amend or restrict any power granted to national banks by section 24 of that Act, and did not declare that "national banks should thereafter have no power to pledge their assets to secure private deposits".

In response to the statements of Mr. Bernard F. Cataldo concerning the distinction between loans and deposits, and the opinions on that subject of the courts of Minnesota and North Dakota (respondent's reply brief, page 19-21), we respectfully refer again to the opinion of this Honorable Court holding that a deposit is a loan[1], and extract the following from the opinion of the Supreme Court of Indiana (March 28, 1933), in the case of *Schornick v. Butler, 185 N. E. 111, 112:*

> "The right of a bank to borrow money and pledge its assets for the payment thereof is beyond serious question. It is urged, however, that a deposit is not a loan and that banks have no power to pledge their assets to secure deposits. There is no reason for the distinction. In either case the relation of debtor and creditor is created. * * * Generally a loan differs from the ordinary deposit only in the evidence of the promise, the time of payment, and the interest rate. The relation created is the same. It is a well-recognized fact that banks in some instances pay various rates of interest upon ordinary checking accounts as well as upon time deposits against which certificates are issued, payable on demand after a certain date, and that they also on occasion borrow money at varying interest rates upon their promissory notes payable upon a date cer-

[1] Petitioner's original brief, p. 39.

> tain. The basic contractual obligation to pay is the same and, if when the money is received the bank assigns collateral as a guaranty of its repayment, we know of no rule or reason which would permit the collateral to be retained in one case and not in another".

It is here noted that Mr. Cataldo's remarks appear in that section of his writings in which public deposits are discussed and that he admits, on the last page of his paper, that if the Courts uphold the analogy between a deposit and a loan, no distinction exists between a public and a private deposit.

Respondent relies upon Mr. Cataldo (pages 22-23) to prove that a bank's creditors are injured when it, while solvent, pledges assets to secure deposits. Again the author's remarks concern public deposits.

In reply, we quote the Supreme Court of Indiana in *Schornick v. Butler, supra:*

> "The municipality to whom the bond was given was not a creditor of the bank nor would it have become a creditor unless the bond was given.
>
> No question of preferring creditors is involved. * * * The bank parted with an interest in the securities equal to the deposit subject to the condition that, to the extent to which it repaid the cash, it would reclaim the securities. It amounts to no more than a sale of securities at their actual value for cash. The general depositors of the bank lost nothing by the transaction, and, if they are affected at all, they are benefited since the bank is more liquid by reason of having the cash rather than the securities. The appellees gained nothing. The public deposit or its proceeds was used, or will be used, for the payment of general creditors of the bank. No more than an equal amount of the pledged notes will be withheld. The action sounds in equity.

> The general creditors of the bank or the appellant, their representative (the receiver), cannot be heard to say that the pledging of the securities was illegal while they retained the benefits of the transaction. Melaven v. Hunker et al., 35 N. M. 408, 299 P. 1075. It would be unconscionable to permit general creditors to profit where they had no loss, at the expense of the appellees, who have profited nothing and have done no wrong. It must not be permitted unless there is some insuperable rule of law which requires it'' (page 112).

In response to the receiver's contention that he may disaffirm the pledge agreement and retain the bonds without returning the railway company's deposits (pages 27-33), we respectfully call the Court's attention to the latter part of the foregoing quotation from *Schornick v. Butler*, and to the decision of the Court of Appeals of New York, in *State Bank of Commerce of Brockport v. Stone, 184 N. E. 750*, (cited by respondent, page 27). That Court following some of the cases cited by respondent, including *Baltimore & Ohio v. Smith*, held that a state bank had no authority to pledge its assets to secure a private deposit. But the Court required the superintendent of banks to return the deposits as a condition precedent to his recovery of the pledged bonds. After holding the pledge agreement void, the Court of Appeals stated:

> ''This does not necessarily mean, however, that the the judgment of the courts below must be reversed, as we have to consider the effect of ultra vires. In pledging these bonds, the officers were acting for and on behalf of the bank, and for its business, apparently seeking to obtain deposits which, under the Banking Law, it was authorized to receive. They applied the deposits to the bank's business, and the bank has had and re-

ceived the benefit of the money due to the agreement which the bank made, and the bonds which it delivered as security. Under these circumstances, it would not be just for the bank or its creditors to accept all the benefits and repudiate the burdens, unless the acts of the bank be in violation of some direct and positive statute. Whatever the difference of view there may be as to the effect of ultra vires on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract."

In this connection, we note that this Honorable Court in *Eastern Building and Loan Association v. Williamson, 189 U. S. 122, 47 L. ed. 735,* approved the following statement by the Court of Appeals of the law of New York:

"We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for, if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability can not be claimed on the mere ground that they have no attributes or facilities which render it possible for them thus to act. While

they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that, while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced; yet, when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power" (U. S. p. 129, L. ed. 741)

We deem it appropriate to quote the concluding paragraphs of the opinion in *State Bank of Commerce Brockport v. Stone, supra*:

"One word, however, remains to be said regarding the effect of this decision, which is stated to be a test case. By no means do we hold that, although banks have no implied authority to pledge their securities for private deposits, yet after the thing is done it cannot be undone. In this particular case the bank became insolvent and was taken over by the superintendent of banks. His duties, however, do not begin with insolvency. Our Banking Law has many provisions seeking to preserve the solvency of banks, and secure depositors. Thus section 39 makes it the duty of the superintendent to examine banks twice a year. 'On every such examination inquiry shall be made as to the condition and resources of such corporation, banker or broker, the mode of conducting and managing its affairs, the actions of its directors or trustees if a corporation, the investment of its founds, the safety and prudence of its managment, the security afforded to those by whom its engagements are held, and whether

the requirements of its charter and of law have been complied with in the administration of its affairs; and as to such other matters as the superintendent may prescribe.'

"Section 56 prescribes: 'Whenever it shall appear to the superintendent that any corporation * * * has violated its charter or any law, or is conducting its business in an unauthorized or unsafe manner, he may issue an order directing the discontinuance of such unauthorized or unsafe practices,' and in case of its failure to comply, he is authorized by section 57 to take possession of the business.

"The superintendent, therefore, is not compelled to wait until insolvency to interfere with the pledging of a bank's securities for private deposits. It is his duty to ascertain the facts, and in such manner as to him seems advisable, and at such time as comports with the necessity of the occasion, compel banks to again retake their assets, if so pledged, upon the return of the deposits, when demanded." (pp. 754-755)

The authority conferred upon the Comptroller of the Currency with reference to national banks, is substantially the same as that conferred upon the Superintendent of Banks of the State of New York. In the instant case the Comptroller's bank examiners learned of the pledge of liberty bonds to the railway company one month before the bank's failure, but made no complaint of the transaction (R. 94-95). Had they, or the Comptroller, then complained, while the bank was solvent, the railway company

could have withdrawn its deposits and have avoided its now threatened loss.

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Respectfully submitted,

S. N. RUSSELL,
First National Bank Bldg.,
El Paso, Texas.

DEL W. HARRINGTON,
Bassett Tower,
El Paso, Texas.

T. D. GRESHAM,
R. S. SHAPARD,
M. E. CLINTON,
Texas and Pacific Bldg.,
Dallas, Texas,
Attorneys for Petitioner,
The Texas and Pacific
Railway Company.